

**IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE**  
**DIVISION II**

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BY MIKE HAMMOND  
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KNOX COUNTY ORIGINAL COURT  
KNOXVILLE, TN

STATE OF TENNESSEE

v.

HARLAN FERGUSON

)  
)  
) No. 108894  
)  
)

**MOTION TO DISMISS COUNTS 1 AND 2 FOR FAILURE**  
**TO PRESERVE VEHICLE PURSUANT TO STATE V. FERGUSON**

Comes now the Defendant, by counsel, and respectfully moves this Court to dismiss counts 1 and 2 of the presentment in the above-captioned case pursuant to State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999) and its progeny, on the grounds that the State has destroyed material evidence in this case, specifically evidence collected at the scene – a vehicle. As grounds for this motion, the Defendant states as follows.

**I. INTRODUCTION.**

It is alleged that on February 3, 2016, Harlan Ferguson was the driver of a vehicle that was involved in an accident at approximately 7:32 pm. Mr. Ferguson's fiancée, Sarah Howe, died as a result of the accident. Knox County Sheriff's Office (KCSO) officers had pursued the vehicle allegedly driven by Mr. Ferguson, arrived at the scene immediately after the accident, and pulled Mr. Ferguson from the vehicle. The officers found Ms. Howe outside the vehicle on the passenger side. Both Mr. Ferguson and Ms. Howe sustained multiple serious injuries and were rushed to the University of Tennessee Medical Center (UTMC) by ambulance and by air, respectively.

On August 30, 2016, more than six months after the accident, a presentment was filed in the Criminal Court for Knox County, Division II, Docket No. 108894, charging the Defendant, Harlan V. Ferguson, with the offenses of Vehicular Homicide, Evading Arrest, Reckless Endangerment, Driving Under the Influence, and Failure to Drive Within a Single Lane of Traffic. On September 26, 2016, Mr. Ferguson was arraigned on this charge and the Office of the Public Defender was appointed to represent him.

On September 30, 2016, counsel for Mr. Ferguson filed a discovery request. A response was provided by the state on October 7, 2016. The State has periodically supplemented this response with additional information as it has been requested. On February 16, 2017, counsel for Mr. Ferguson specifically requested information regarding the vehicle involved in the accident at issue. On that same date, the State advised that the vehicle had been released by the Knox County Sheriff's Office (hereinafter, "KCSO") to the victim, Ms. Howe's, insurance company.

Subsequent information provided by the State indicates that the vehicle was towed from the scene of the accident by Cedar Bluff Towing on February 3, 2016. While it appears there may have been a hold initially placed on the vehicle, it was released only five (5) days later, on February 8, 2016, by Chief Henderson. Chief Henderson failed to document the hold or the release of the vehicle. EXHIBITS A and B.

At the time of the vehicle's release, it was insured by Tennessee Farmers Mutual Insurance Company. EXHIBIT C.

Tennessee Farmer's Mutual Insurance Company arranged for the sale of the vehicle through Insurance Auto Auctions. The vehicle was sold on July 27, 2016, to Lowe's Auto Parts. EXHIBIT D.

Subsequent to the vehicle's sale to Lowe's Auto Parts, Lowe's removed the back bumpers and taillights. The company then crushed the car and melted the glass.

In addition to the proof attached hereto, the State has advised Counsel that it will concede the vehicle was released and destroyed.

Due to the State's release of the vehicle, it is no longer available for viewing, examination, or inspection by the defense. As a result, the State's conduct has materially impaired Mr. Ferguson's ability to defend himself. Counts 1 and 2 of the presentment pending against Mr. Ferguson should be dismissed under *State v. Ferguson*, 2 S.W.3d 912, 915-916 (Tenn. 1999), and its progeny.

## **II. STATEMENT OF RELEVANT FACTS.**

### **A. The Accident.**

The State alleges that on February 3, 2016, Mr. Ferguson was operating a motor vehicle in an unlawful and reckless manner, while under the influence of an intoxicant, and that Mr. Ferguson's behavior resulted in the death of the passenger in the vehicle – Ms. Sarah Howe. Ms. Howe was Mr. Ferguson's fiancée. She was also the owner of the vehicle.

Discovery provided by the State indicates that on February 3, 2016, KCSO officers were in the area of Emory Road and Bell Road. They were engaged in the pursuit of a suspect in an unrelated case when Chief David Henderson observed a car passing the chief's unmarked car at a high rate of speed. Chief Henderson re-routed

one of the officers, Lt. David Amburn, to investigate this second vehicle, which officers later determined was driven by Mr. Ferguson.

Chief Henderson and Lt. Amburn began a pursuit of the vehicle, traveling from Emory Road to Bell Road. Though Lt. Amburn temporarily lost sight of the car, he noticed what appeared to be a crashed vehicle, after rounding a curve.

As the officers approached the crashed vehicle, they noticed Mr. Ferguson was attempting to exit the car. Before Mr. Ferguson was able to exit, however, the car burst into flames. The officers pulled Mr. Ferguson from the car and then went to the passenger side to check for occupants. As Lt. Amburn went around the car, he noticed a female lying beside the passenger side rear wheel. The female, who was later identified as Ms. Howe, was semi-conscious. She was removed from the area of the fire and later transported by Life Star to the University of Tennessee Medical Center (hereinafter, "UTMC"), where she later died.

#### **B. Removal of the Vehicle from the Scene of the Accident.**

Information provided by the State and through subpoenaed documents indicates that the crashed vehicle was removed from the scene of the accident by Cedar Bluff Towing. The tow company removed the vehicle the same night as the accident.

Initially, the lead officer on the case – Chief David Henderson- placed a hold on the vehicle. But, this hold was released within just days. The State has advised that there are no records which indicate why the vehicle was released. As the active investigation of this case was not yet closed, and charges were not filed until August 30, 2016, it is not clear why the vehicle was released so quickly.

On February 8, 2016, just five (5) days after the accident, Cedar Bluff was advised by Chief Henderson that the hold on the vehicle was released. The vehicle was released to the deceased's insured – Tennessee Farmer's Insurance.

Tennessee Farmer's Insurance arranged for the vehicle to be picked up by the Insurance Auto Auctions (hereinafter, "IAA") company. The car was removed from the tow lot on February 16, 2016. The car was then stored at the IAA lot until a July auction.

On July 27, 2016, the vehicle was purchased at this auction by Lowe's Auto Parts. Lowe's Auto Parts is a salvage company that purchases damaged vehicles for the eventual resale of parts. Subsequent to the vehicle purchase, Lowe's removed the back bumpers and taillights, crushed the vehicle, and melted the glass.

### **C. Evidentiary Value of Vehicle.**

While the State would contend that this case is simple, in fact, it is not. This vehicle was of significant importance to the preparation and construction of Mr. Ferguson's case. Due to its release by the State, and the State's otherwise incompetent handling of the scene and evidence, Mr. Ferguson finds himself at a constitutionally impermissible disadvantage.

#### **1. Nature and Cause of Accident**

Here, the State has alleged that the cause of the accident in this case is due to Mr. Ferguson's reckless driving. However, other than this assertion, itself, and the testimony of the officers that were pursuing the vehicle Mr. Ferguson was driving, there is no solid evidence to indicate Mr. Ferguson, himself, was responsible for the accident.

More importantly, there is no longer any evidence which would indicate Mr. Ferguson was not responsible for the accident. The absence of such evidence is due to the destruction of the vehicle in this case. Were the vehicle available for inspection, the defense would be able to determine whether there was a mechanical or electrical issue which caused the accident : consider, for example, the effect a blown tire, or the failure of a ball joint, might have on one's ability to successfully control a vehicle. If there had been such a mechanical failure in this vehicle, the likelihood of an accident would have been great, regardless of Mr. Ferguson's level of intoxication or manner of driving.

## **2. Proximate Cause of Ms. Howe's Death**

Here, the State has further alleged that Mr. Ferguson's intoxication was the "proximate cause" of Ms. Howe's death. Yet, without the vehicle to examine, how is Mr. Ferguson to counter this claim? Without the vehicle, and in particular the Event Device Recorder (hereinafter, "EDR"), we have absolutely no information regarding what was occurring within the vehicle at the time of the accident.

The EDR would have been able to provide the defense information on how Mr. Ferguson was driving the vehicle and any actions Ms. Howe may have taken. The EDR for this model of vehicle would have recorded this information.

The EDR is a module which is found near the front center of a vehicle. It is intended to survive crashes. The module is able, through the use of proprietary software, to generate a report. This report is comprised of information that is stored for the five seconds preceding an "event". An "event" includes a crash. The EDR may store up to two (2) events. The events may be an airbag deployment event, or a non-deployment event. The report includes a host of helpful information, including but not

limited to : 1) ignition cycle, (2) acceleration, (3) vehicle roll angle, (4) steering input (including degrees and direction which steering wheel is turned), (5) service break, (6) multiple location airbag deployment, (7) stability control, (8) presence of driver, (9) presence of passenger, (10) seatbelt use or non-use of driver, (11) seatbelt use or non-use of passenger, (12) seat track position of driver and passenger, (13) occupant size classification, (14) speed at time of crash, and (15) driver actions at time of crash.

#### EXHIBIT E.

Clearly, information related to the activities of both the driver and passenger is important to the defense's preparation and trial of this case.

### III. SUMMARY OF APPLICABLE LAW.

In *State v. Ferguson*, 2 S.W.3d 912, 915-916 (Tenn. 1999), our Supreme Court "explained that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *Ferguson*, 2 S.W.3d at 915-16. In *Ferguson*, the Court rejected the *Arizona v. Youngblood*, 488 U. S. 51 (1988), "bad faith" standard, instead enunciating a standard that asked whether a defendant's trial, conducted without the destroyed evidence, would be "fundamentally unfair." *Ferguson*, 2 S.W.3d 912, 914 (Tenn. 1999). Indeed, the Tennessee Supreme Court rejected the *Youngblood* "bad faith" approach on the ground that it fails to adequately protect the right to a fair trial under the Due Process Clause of the Tennessee Constitution. 2 S.W.3d 912, 916 (citing Tenn. Const. Art. I, §8). The *Ferguson* court then developed a three-step analysis to determine whether a trial without the destroyed evidence would be fair: (1) establishing whether the State had a duty to preserve the evidence, (2) determining if the State breached its duty to preserve

evidence and (3) balancing several factors which should guide the decision regarding the consequences of the breach. *Id.* at 917.

The Tennessee Supreme Court began its analysis of whether Ferguson's trial was "fundamentally unfair" by asking whether the state had a duty to preserve the evidence in question, which was a police cruiser video. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." 2 S.W.3d at 918. To meet this standard of "constitutional materiality", the Court said the evidence must both "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 918. The Court has identified some of the factors to be considered in assessing the appropriate remedy:

- (1) [t]he degree of negligence involved;
- (2) [t]he significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
- (3) [t]he sufficiency of the other evidence used at trial to support the conviction.

*State v. Merriman*, 410 S.W.3d 779, 785 (Tenn. 2013). *Merriman* noted that, despite the third factor's focus on evidence presented at trial, such a motion could be filed pre-trial, and would involve the trial court "weigh[ing] the significance of the lost evidence in light of the other evidence and to determine an appropriate remedy." *See also State v. Dustin Wayne Capps*, No. E200702734CCAR3CD, 2009 WL 690685 (Tenn. Crim. App. Mar. 13, 2009) *abrogated on other grounds by State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013) (dismissal of charges where videotape that directly captured the alleged aggravated robbery was destroyed, not pursuant to standard procedure).



If the proof shows a duty to preserve the evidence and a failure by the State in that duty, then the following factors must be considered: "(1) the degree of negligence involved; (2) the significance of the destroyed evidence considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and, (3) the sufficiency of the other evidence used at trial to support the conviction." Ferguson, 2 S.W.3d at 917.

#### **IV. APPLICATION OF LAW TO FACTS.**

##### **A. The State's Release of the Car was a Violation of Its Duty to Preserve Important and Unique Physical Evidence.**

##### **1. The State had a duty to preserve the car.**

In this case, the defense was entitled to view and inspect the decedent's vehicle and to inspect the Event Data Recorder. In criminal court, such access is mandated under Rule 16(a)(1)(F)(i) (defense entitled to access to tangible objects in the State's control if they are "material to preparing the defense" or the State "intends to use the item in its case-in-chief").

The State alone had control over the car, and had a duty to maintain it. See *Merriman*, 410 S.W.3d at 785 ("the State's general duty to preserve all evidence subject to discovery and inspection" under law). As to whether the evidence might be expected to play a significant role in the defense, it is surely relevant that the vehicle's condition was not properly documented and that no inspection or reports were made prior to Chief Henderson's release of the vehicle. Had the defense been able to inspect the vehicle and run an EDR report, the defense would be able to counter the State's claims regarding Mr. Ferguson's behavior and whether his actions were the proximate cause of Ms. Howe's death. As the Court noted in *Merriman*, the defense need only establish

that the evidence was "potentially" exculpatory. 410 S.W.3d at 785. It has surely met that hurdle here.

**2. The State allowed the evidence to be destroyed.**

The car is no longer within reach of the defense. Here, the defense has been able to track down the car through a series of subpoenaed documents. However, in the end, it was determined that the vehicle had been destroyed prior to the charges were even filed in this case. Whatever evidence that the defense could have gleaned from inspection of the car has been lost irretrievably by the State's action.

**B. Dismissal Is the Appropriate Remedy.**

**1. Degree of negligence.**

The negligence of the State in allowing this vehicle to be released is extremely high. Indeed, it surely surpasses mere negligence. Chief Henderson is a well-seasoned officer with the Knox County Sheriff's Office. It is highly unlikely this was the first vehicle accident with death scene he had worked. He was doubtlessly aware of the evidentiary value of the vehicle involved in the accident. Further, in releasing the vehicle, Chief Henderson failed to document anything related to the vehicle's release. Further, he failed, prior to its release, to have the condition of the vehicle documented, photographed, or inspected. How could an officer with decades of experience not know that the vehicle was an important (and almost exclusive) piece of evidence in this case?

This is not forgivable negligence in the sense of some overlooked item of evidence of dubious relevance mistakenly falling through the cracks. The State's course of action in this case weighs strongly in favor of dismissal.

**2. Significance of evidence, availability of substitute evidence, and sufficiency of other evidence.**

The car in this case was essentially the crime scene. Any independent effort by the defense to recreate that crime scene in order to test the State's theory as to exactly how the accident occurred would require access to the car. The State has not only overlooked, but has absolutely failed to document aspects of the car that would shed light on the case. Because of the State's actions there is no comparable substitute evidence available.

Most particularly, it is evident that the State intends to use evidence of Mr. Ferguson's "reckless" driving, and subsequent accident. Yet, the State has no proof of "reckless driving" other than the officers' testimony; and has failed to properly investigate and document the scene of the accident.

Here, the State has alleged that Mr. Ferguson was driving recklessly and that due to this recklessness and intoxication, he had an accident, in which his fiancée, Sarah Howe, perished. However, there is no longer any independent, objective evidence, which indicates that Mr. Ferguson was either driving recklessly, or that his driving caused an accident.

Here, after officers arrived on the scene, they first removed Mr. Ferguson and Ms. Howe from the area of the vehicle. After ensuring that they were en route to the hospital, officers 'processed' the accident scene. However, the way in which the KCSO processed the accident scene falls well below local and national standards. The KCSO had the responsibility of protecting the scene, preserving the physical evidence, and collecting and submitting the evidence for scientific examination. Here, however, other than a few poorly documented and composed photographs, there is absolutely nothing

the KCSO did to preserve the evidence in this case. An example sampling of the photographs provided by the State in this case are attached as EXHIBIT F.

Photographic documentation of an accident scene creates a permanent historical record of the scene. Photographs should provide detailed evidence that constructs a system of redundancy should questions arise concerning the report, or position of evidence at the scene. The investigator should provide detailed photographic documentation of the scene that provides both instant and permanent high-quality images. It is important to document in writing a description of each photo so that it can be used for future reference. Further, should the photograph documentation of the evidence be made more difficult due to the circumstances (such as here, the lighting), the evidence should be photographed again later under more suitable conditions. See, generally, Crime Scene Examination, National Institute of Justice, <https://nij.gov/topics/law-enforcement/investigations/crime-scene/Pages/welcome.aspx> (last visited May 31, 2017); and Crime Scene Investigation : A Guide for Law Enforcement, U.S. Department of Justice (January 2000), available at <https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/april2000/twgcsi.pdf> .

One may see from these photographs that only an insubstantial number of photographs were taken at the scene. Of these photographs, only a small portion document the vehicle or the location of the accident. These photographs, however, are of such poor quality that they provide very little (if any) information that is valuable to the defense.

The photographs certainly do not provide the information that an inspection of the vehicle and a report by the EDR would have provided. A defense expert would have been able to view other areas of the car to determine whether there were any mechanical or electrical issues which contributed to the accident; and through use of the EDR would have been able to provide information regarding the activities of both Mr. Ferguson and Ms. Howe. Did Ms. Howe grab the steering wheel, was she wearing her seat belt, was she in her seat? Due to the State's failure to preserve the evidence in this case, we will never know.

Here, the KCSO failed to properly document the condition of the vehicle; and more importantly, failed to remove the EDR for further analysis. The KCSO office has within their capacity to better document an accident scene and there is no excuse for their failure to do so in this case.

In addition to failing to properly preserve the condition of the vehicle, the State so shoddily handled the scene, otherwise, that there is absolutely no competent evidence which may be gleaned from its reports. Here, there was no accident reconstruction or survey of the scene. Further, not all aspects of the scene were photographed. Missing is evidence of the area of impact, the operator's view approaching crash, road evidence, interior of the vehicle, collision debris distribution, and vehicle damage. There was not a 'to scale' drawing, nor was the drag factor of the road measured. The investigating officers did not 'walk the scene' to look for road defects or evidence that the road may have caused the collision. Nor did the investigating officers determine whether a portion of the vehicle or its restraints malfunctioned. The clothing of the occupants was not secured; were it still available it might be inspected to determine the point of impact and

travel of the decedent's body. The available reports do not indicate who the medical responders were who treated Mr. Ferguson and Ms. Howe; nor were their injuries at the scene properly documented. Equally important, the investigators did not document the uninjured portions of the occupants, as well. There are no tire marks or road measurements; nor is there documentation of visibility, weather or lighting issues.

There are none of these things that would have been documented and preserved in a properly processed accident scene. Instead we are left with only a smattering of poor quality photographs.

The examinations that would have been available to the defense were the car and EDR still available cannot be replicated by consulting other evidence in the case. The defense has forever lost the ability to double-check the quality of the State's investigation. *See State v. Stephens*, 529 S.W.2d 712, 713 (Tenn. 1975) (a defendant should not be forced to rely on the State's analysis of the evidence in a case). The defense has forever lost the ability to examine the rest of the car for other evidence ignored by the State.

Finally, this is not a case where other evidence of the defendant's guilt is overwhelming. Other than proof that Mr. Ferguson was the driver of the vehicle through the officer's testimony and that he had alcohol in his system, there is no proof that Mr. Ferguson's intoxication was the "proximate cause" of his fiancée's death. Mr. Ferguson has lost the ability to confront and dispute the State's evidence. All of these factors weigh strongly in favor of dismissal of the first two counts of this presentment.

### **3. Conclusion.**

In light of the obvious importance of this evidence and the egregious nature of the State's actions, the only appropriate remedy would be to dismiss counts one and two of this case. Any trial conducted in these circumstances, where the actions of the State have served to gratuitously deny the defense access to crucial evidence, would not produce a reliable and fair result as guaranteed by the Tennessee constitution.

#### **B. In the Alternative, Trial After The State's Release of the Vehicle Would Violate Federal Due Process.**

As noted above, under Tennessee law a showing of bad faith is not required. In this case, however, it is apparent that the State acted in bad faith and therefore a trial conducted in these circumstances would violate federal due process as well. See *Moldowan v. City of Warren*, 578 F.3d 351, 385 (6th Cir. 2009). Here, the State had reason to believe that the vehicle in this case was important evidence in this case and that the defense would need to inspect the vehicle. It nonetheless deliberately chose, through its action, to allow the vehicle to leave its hands.